NOTE.—The wholesome doctrine laid down by President Keith in the foregoing opinion, as to the economical administration of property in the hands of receivers, will doubtless commend itself to those of the profession to whom such plums as receiverships are not accustomed to fall. In certain quarters, especially in the Federal courts, assets in the hands of receivers are often consumed by receivers' salaries and counsel fees, owing to the somewhat exaggerated notions that seem to prevail in those courts as to the value of the services of receiver and counsel, as compared with the rights of creditors whose interests these functionaries are supposed to conserve. Without reference to the facts of the particular case, of which we know nothing except as they appear in the opinion, it is refreshing to find our Court of Appeals serving notice on the lower courts and their receivers, that the higher court proposes to scrutinize allowances to receivers, and to restrain such allowances within moderate bounds.

The point of special interest in this case is the construction of sec. 2486 of the Code (as amended), with reference to the liens of employees and material men against the assets of transportation, mining and manufacturing companies. It will be observed that the court repudiates the rather technical view adopted by the United States Circuit Court of Appeals in *Liberty etc. Co.* v. *Furbush*, 3 Va. Law Reg. 86, and adopts the view presented by the late R. G. H. Kean, in a criticism of that decision, published as a note to the case, in 3 Va. Law Reg. 95.

The view thus adopted seems more nearly to conform to the legislative intent, and is certainly much more liberal in upholding the claims which it was the purpose of the statute to secure.

The particular point upon which the court diverged from the ruling of the Federal Court, is, that while the memorandum must be filed in the clerk's office within ninety days after the service was rendered or the supplies furnished, it need not show *on its face* that the claim was filed within the ninety days, but this may be proved by evidence *aliunde*.

ANDES V. ROLLER, GUARDIAN.*

Supreme Court of Appeals: At Richmond.
November 22, 1900.

1. SEPARATE ESTATE—*Death of wife intestate—Effect as to personal estate.* A bequest of personal property to a married woman, "to be her separate estate, free from the debts and control of her present or any future husband," without more, vests the property in her absolutely, and, upon her death intestate, it passes to her husband as her sole distributee, subject to the payment of her debts and funeral expenses.

Appeal from a decree of the Circuit Court of Rockingham county.

Reversed.

The opinion states the case.

Sipe & Harris, for the appellant.

O. B. Roller & Martz, for the appellees.

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* Reported by M. P. Burks, State Reporter.

CARDWELL, J., delivered the opinion of the court.

The 7th and 8th clauses of the will of Abraham Garber, late of the county of Shenandoah, are as follows :

"I devise and bequeath unto my son, Joseph, my farm known as the 'Homar farm,' on which he resides, and on account of his losses by flood I do not charge him with advancements made to him; but I do specifically charge this tract of land with the payment by my son Joseph, to be made unto my daughter, Hannah, wife of Dilman Andes, of the sum of $3,000 (three thousand dollars), to be paid in ten equal annual payments of $300 each, without interest until due."

"I give and bequeath unto my daughter, Hannah, wife of Dilman Andes, $3,000 as provided for in item 7, to be paid by my son Joseph as therein set forth; said sums of money to be her separate estate free from the debts and control of her present or any future husband, and I direct that no advancements made to her during my life shall be collected from her."

After the death of the testator and the probate of his will, Hannah Andes, on the 19th day of December, 1898, departed this life intestate, leaving surviving her husband, Dilman J. Andes, and nine children, all of whom were infants except two. At the time of her death no part of the legacy given her by the 8th clause of her father's will had been paid.

This suit was instituted to have the Circuit Court of Rockingham county determine whether the said legacy, upon the death of Hannah Andes, passed to her husband under the statute of distributions or whether, under the will of the testator, it was an equitable separate estate in the legatee, and being such, passed upon her death to her nine children without the right of the husband and father to any part thereof.

The Circuit Court decreed that under the provisions of the 7th and 8th clauses of the will, the legacy upon the death of Hannah Andes descended to her children, subject only to the payment of her debts and funeral expenses, and without the right of Dilman J. Andes her husband, to any part thereof. From this decree Dilman J. Andes obtained an appeal to this court.

Section 2294, chapter 103, of the Code of Virginia, provides that "nothing contained in the preceding sections of this chapter shall be so construed as to prevent the creation of equitable separate estates. Such estate shall not be deemed to be within the operation of such sections, but they shall be held according to the provisions of the respective settlements thereof, and shall be subject to and governed by the rules and principles of equity applicable to such estates."

That statute maintains what is known as the equitable separate estate of the wife, unaffected by the statutory provisions whereby the legal or statutory separate estate of the wife is created and preserved. When once the wife is permitted to take personal estate to her use as a *feme sole*, she must take it with all its privileges and incidents, one of which is the *jus disponendi*. *Felterplace* v. *Gorges*, 1 Vesey, Jr. 46; 1 Williams' Exors. 80. And it is said in the opinion of Harrison, J., in *Kiracofe* v. *Kiracofe*, 93 Va. 593: "Where a married woman has a separate estate, and the instrument creating the estate does not restrain her power of alienation, she has by virtue of the statute (sec. 2513 of the Code) complete power of alienation by will. It is not necessary that the instrument creating the estate should contain express power in her to alien. She has that power under the statute, unless it is restrained or withheld from her by the instrument, and if she exercise her statutory power, and disposes of the estate by will, it deprives the husband of curtesy as effectually as he would have been deprived of it under a similar disposition made by the wife in pursuance of a power vested in her by the settlement. If the married woman has the power to devise, and fails to exercise it, her husband will be entitled to curtesy, but where she disposes of her separate property by will, as she has the right to do unless restrained, the husband's right to curtesy is lost."

So where an equitable separate estate is created in the wife, whether in real or personal property or money, she has the power to alien it, unless it is restrained or withheld from her by the instrument creating the estate, and if she does not exercise that power the estate passes at her death according to the law of descents and distribution, as the case may be. Therefore, a decision of this case turns upon whether or not by the terms of the 8th clause of Abraham Garbers's will, the power to alien the legacy given to Hannah Andes is restrained or withheld from her?

Mr. Burks, in his valuable work on "Separate Estates," p. 15, says: "If the property be settled to the sole and separate use of the wife, without more, the husband, during the coverture, has no interest in the property, real or personal, so settled; but if the wife die, the husband surviving is entitled to qualify as her administrator and is sole distributee of her personal estate."

And Mr. Minor, 1 Minor's Insts. (4 ed.) 347, states the law thus: "When, by settlement, the wife is allowed to dispose of certain property by deed or will, but dies without making any disposition of it,

there is no separate estate created, and the husband surviving is entitled as her distributee to the personalty."

Both of these authors cite as authority for the view of the law they respectively express, *Mitchell* v. *Moore*, 16 Gratt. 280.

In that case, the opinion by Robertson, J., said: "A deed of settlement may be so framed as to deprive the husband of all his marital rights, but he will never be deprived of them to a greater extent than the terms of the deed require. In this case the deed of settlement only excludes the rights of the husband surviving his wife in the event of her exercising the power of appointment conferred upon her. She died without having exercised that power and leaving her husband surviving, so that he became entitled to all the personal estate embraced in the settlement, subject only to the payments of the debts for which it was bound, if any such there were, funeral expenses and charges of administration. Numerous authorities might be cited, but it is sufficient to refer to *Pickett and Wife* v. *Chilton*, 5 Munf. 467, which is to the point and decisive of the question."

The 8th clause of the will in this case settled the bequest of $3,000 upon Mrs. Andes to her sole and separate use free from the debts and control of her husband, but without other or more restrictive provisions. The construction of the language employed by the testator in making the bequest is uncontrolled or affected by any other provisions of the will, and we are of opinion that it cannot be rightly construed as restraining or withholding from the legatee the power to dispose of, by will or otherwise, the estate settled upon her. The effect of it was to deprive the husband, during coverture, of any interest in the property thus settled, and nothing more. There is nothing whatever in the will whereby the children of Mrs. Andes took as *purchasers* the bequest, and hence it is impossible that they took by *descent*, under the statute, to the exclusion of their father. Therefore, the wife having died intestate, the husband surviving, is entitled, under 2d sub-division of section 2557, chap. 113 of the Code, as her sole distributee, to the legacy embraced in the settlement, subject only to the payment of the debts for which it was bound, if any such there were, funeral expenses and charges of administration.

The decree appealed from must be reversed and annulled and the cause remanded to be further proceeded with in accordance with this opinion. *Reversed.*

NOTE.—It does not distinctly so appear from the opinion, but the limitation to the wife in the foregoing case seems to have been made after the adoption of the

Code of 1887. The court assumes, rather than decides, that under the Code of 1887 the limitation to the wife—"I bequeath to my daughter . . . to be her separate estate free from the debts and control of her present or any future husband"—created an equitable separate estate in the wife, and not a statutory separate estate. Tested by the rule announced in *Jones* v. *Jones*, 96 Va. 749, 4 Va. Law Reg. 818, there might be some question about this. The test there announced, as to whether an estate settled upon a married woman, since the adoption of the Code of 1887, is a statutory estate or an equitable separate estate, is that "if the instrument grants powers or imposes restrictions not granted or imposed by the statute, but which are yet consistent with the rules and principles of equity, the estate will be construed to be an equitable and not a statutory separate estate." In the principal case, no restrictions were imposed nor powers granted not imposed or granted by the statute. The testator merely declared that the legacy should be "separate estate," and "free from the debts and control" of the legatee's present or future husband. Each of these provisions is a characteristic of statutory separate estate. The statute distinctly declares that all property acquired by a married woman shall be her "separate estate" (sec. 2284), and not subject to the use, *control* or disposal of her husband or to his *debts* or liabilities (sec. 2285). In other words, the testator gave her—so far as he undertook to prescribe her right of enjoyment—precisely such rights as the statute gives to the married woman who owns statutory estate. On what ground, therefore, she is to be held to have acquired an *equitable* separate estate, is not clear, unless the test prescribed in the former case be abandoned.

This question was of little or no importance in the principal case, since upon the death of the wife, the husband was entitled to take the property as her sole distributee, whether it were *equitable* separate estate or *statutory* estate. But the general question as to when a particular conveyance to a married woman will create an equitable separate estate, and when a statutory estate, is an important one, and for this reason attention is directed to the views apparently held by the court in this case.

The decision that the husband was entitled to the estate, as sole distributee of his wife, seems to follow as of course from sec. 2557 (sub.-sec. 2) of the Code, providing that "if the intestate was a married woman, her husband shall be entitled to the whole" of her personal estate.

We fail to see, however, how the decision turned, as the court declared that it turned, upon "whether or not by the terms of . . . the will, the power to alien the legacy is restrained or withheld from her." If the wife were the owner of the complete e tate in the legacy (as seems not to have been questioned), the right of the husband as her distributee, depended in no respect upon her power of alienation. He did not claim as her alienee. On the contrary, his claim rested in the fact that she had *not* aliened the property. If she had been expressly forbidden to alien, either in life or by will, the husband would still have been entitled to the whole as her sole distributee—unless (possibly) the testator had indicated a clear intention on the face of his will to exclude the husband *as such distributee*. The real point in the case appears to have been, not whether the wife had power to alien, but whether the terms of the gift indicated an intention to exclude the husband not only during coverture, but as distributee of the wife.

We have no difficulty in concluding that the terms in which the legacy is bestowed, do not either expressly or by implication exclude the rights of the surviving husband as sole distributee of the wife.

Nor is it altogether clear, even had the will in clearest terms excluded the rights of the surviving husband, that the children of the wife would have taken either as distributees or otherwise. They could not take as purchasers, because not mentioned in the will bestowing the estate upon the wife; nor as distributees (it would seem) under the statute, because, under the statute, children are not distributees of their mother, if the husband and father be living. Whatever view, therefore, the court may have taken as to the legal effect of the gift to the wife —whether the estate were statutory or an equitable separate estate—whether the wife's power of alienation were absolute, restricted or wholly wanting—so long as the husband and father was alive, there was no possibility of the children taking priority over him.